Supreme Court, U. S.
FILED
MAR 29 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1492

BERNARD GUTTMAN t/a
LIBERTY NURSING CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and
PROFESSIONAL HEALTH CARE DIVISION,
RETAIL CLERKS LOCAL 1361,
CHARTERED BY RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 78-1571

EDWARD H. FEEGE
HAYES AND FEEGE, P. C
2851 W. Emaus Avenue
Allentown, PA 18103
(215) 791-3833

Counsel for Bernard Guttman t/a Liberty Nursing Center

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON
EASTERN PENNSYLVANIA REPRESENTATIVE
THE PLAZA, SUITE 23F, PHILADELPHIA, PA. 19103
PHONE: (215) 568-7788

INDEX.

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	3
Statute Involved	3
Statement of the Case	3
Electioneering At The Polls	4
Threats To Employees	5
Alleged Campaign Misrepresentations	7
Certification Of Respondent Union	8
Reasons for Granting the Writ	9
I. The Decision Below Raises The Significant And Recurring Problem Concerning What Constitutes The Existence Of Substantial And Material Factual Issues Which Require The Board To Set An Evidentiary Hearing Before Disposing Of Objections To Elections	9
The Agency Or Representative Status Of Two Employers Involved In Electioneering	11
Threats To Employees	14
Alleged Campaign Misrepresentations	15
Summary	17
II. The Decision Below Raises A Conflict Between The Third Circuit And Several Other Circuits	18
Conclusion	18

Page

Appendix:

Appendix A—Opinion of the Court of Appeals 19
Appendix B—Decision and Order of the National Labor Relations Board 21
Appendix C—Decision and Certification of Representative 35
Appendix D—Report and Recommendations on Objections to Election 37
Appendix E—Provisions of the National Labor Relations Act, As Amended 45
Appendix F—Unreported Opinion—Beaird-Poulan Division v. NLRB 48
Appendix G—Opinion—Prestolite Wire Div. v. NLRB 54

TABLE OF CITATIONS.

Cases:

Alson Mfg. Aerospace Div. of Alson Industries, Inc. v. National Labor Relations Board, 523 F.2d 470, 90 LRRM 2520 (9th Cir. 1975) 9,16
Argus Optics, A Division of Argus, Inc. v. National Labor Relations Board, 515 F.2d 939, 945-46, 89 LRRM 2280 (6th Cir. 1975) 9
Beaird-Poulan Division, Emerson Electric Company v. National Labor Relations Board, *et al.*, ... F.2d ...., 97 LRRM 2994 (8th Cir. 1978)..... 13
Colson Corporation v. National Labor Relations Board, 347 F.2d 128 (8th Cir. 1965) 12
Croley v. Matson Navigation Company, 434 F.2d 73 (5th Cir. 1970) 10
Dovell v. Arundell Supply Corporation, 361 F.2d 543 (D.C. Cir. 1966), *cert. den.*, 385 U.S. 841, 87 S.Ct. 93, 17 L.Ed.2d 74 (1966) 10

Page

Fidelity Telephone Company v. National Labor Relations Board, 573 F.2d 534, 98 LRRM 2014 (8th Cir. 1978) 12
Hollywood Ceramics, Inc., 140 NLRB 221, 224 (1962) 15
Mauk v. Wright, 367 F.Supp. 961 (E.D.Pa. 1973) 10
Milchem, Inc., 170 NLRB 362 (1968) 11
National Labor Relations Board v. Carlton McLendon Furniture Company, Inc., 488 F.2d 58, 61, 85 LRRM 2177 (5th Cir. 1974) 9
National Labor Relations Board v. Georgetown Dress Corporation, 537 F.2d 1239, 92 LRRM 3282, 3285 (4th Cir. 1976) 12
National Labor Relations Board v. Modine Manufacturing Co., 500 F.2d 914, 916, 86 LRRM 3197 (8th Cir. 1974) 9
National Labor Relations Board v. Southern Paper Box Company, 473 F.2d 208, 82 LRRM 2482 (8th Cir. 1973).....9,14,15
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)..... 10
Prestolite Wire Division v. National Labor Relations Board, ... F.2d ...., 100 LRRM 2503 (6th Cir. 1979)..... 17
Seamprufe, Incorporated, 82 NLRB 892 (1949)..... 14

Statutes, Regulations and Rules:

United States Code, Title 28, § 1254..... 2
Title 29, § 158 3
NLRB Rules and Regulations, 29 C.F.R. § 102.69(c).. 9,10
Rule 56 of the Federal Rules of Civil Procedure 10,11

IN THE

Supreme Court of the United States

October Term, 1978

No. .....

BERNARD GUTTMAN t/a
LIBERTY NURSING CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

PROFESSIONAL HEALTH CARE DIVISION, RETAIL CLERKS LOCAL 1361, CHARTERED BY RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Bernard Guttman t/a Liberty Nursing Center, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 15, 1979.

Opinion Below

The Opinion of the Court of Appeals is not yet officially reported and appears in Appendix A hereto at pp. 19-20.[1] The Decision and Order of the National Labor Relations Board enforced by the Court of Appeals is reported at 235 NLRB No. 179 (1978) and appears in Appendix B hereto at pp. 21-34. The Decision and Certification of Representative, dated September 28, 1977, issued by the National Labor Relations Board certifying the Respondent, Professional and Health Care Division, Retail Clerks Local 1361, Chartered by Retail Clerks International Association, AFL-CIO, appears in Appendix C hereto at pp. 35-36. The Report and Recommendations On Objections To Elections issued by the Acting Regional Director for the Fourth Region of the National Labor Relations Board, dated July 21, 1977, appears in Appendix D hereto at pp. 37-44.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on January 15, 1979. This Petition For Certiorari is being filed within 90 days of that date. This Court's jurisdiction is being invoked under 28 U.S.C. § 1254.

---

[1] In the Court below, this case was styled BERNARD GUTTMAN t/a LIBERTY NURSING CENTER, Petitioner v. NATIONAL LABOR RELATIONS BOARD, Respondent and PROFESSIONAL HEALTH CARE DIVISION, RETAIL CLERKS LOCAL 1361, CHARTERED BY RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, Intervenor at No. 78-1571.

Question Presented

Whether the National Labor Relations Board deprived Petitioner of due process when, without conducting an evidentiary hearing, it summarily dismissed certain of the Petitioner's objections to an election won by the Respondent Union even though the following material and factual issues existed:

a. Whether one or both employees who spoke to other employees waiting in line to vote and where one of said employees specifically asked another prospective employee voter to vote for the Union were agents or representatives of the Respondent Union;

b. Whether the atmosphere in which the election was conducted was sufficiently tainted to affect the employees' choice because of threats made by an admitted Union agent to several employees concerning, *inter alia*, possible loss of their jobs if they voted against the Union;

c. Whether the Union's misrepresentation of the financial condition of nursing homes owned by Petitioner in other states had a significant impact upon the free choice of the employees?

Statute Involved

The relevant provisions of the National Labor Relations Act, as Amended, 29 U.S.C. § 158 (the "Act") are set forth in Appendix E at pp. 45-47.

Statement of the Case

This case involves an Order of the National Labor Relations Board (sometimes referred to herein as the "Board"), enforced by the Court of Appeals, requiring the Petitioner to bargain with the Respondent Union as the collec-

tive bargaining agent for certain of Petitioner's employees at his nursing home in Allentown, Pennsylvania.

The case arose out of a Petition filed with the Board by the Respondent Union for certification as the exclusive bargaining agent for certain employees of the Petitioner at his nursing home. Pursuant to a Stipulation For Certification Upon Consent Election approved by the Board's Regional Director, an election by secret ballot was conducted on June 10, 1977 in a unit approved by the Board. Fifty-nine votes were cast for the Respondent Union with forty-four votes cast against the Respondent Union with six ballots challenged by the Respondent Union. The Petitioner filed timely objections to the conduct of the election and conduct affecting the results of the election. In support of these objections, the Petitioner furnished to the Regional Director affidavits from the Petitioner himself and several employees.

An investigation was conducted by a representative of the Regional Director on the objections. The investigation consisted of a review of the affidavits submitted by the Petitioner and apparent interviewing of and taking statements from various persons. At the conclusion of the investigation, without holding an evidentiary hearing to resolve any factual issues, the Acting Regional Director (hereinafter referred to as the "Regional Director") issued a Report and Recommendations on Objections to Election, stating that the Petitioner's Objections lacked merit, recommending that they be dismissed and the appropriate certification of the Respondent Union issue.

Electioneering At The Polls.

In his Report and Recommendations on Objections to Election, the Regional Director found that one employee who had voted in the morning session returned to the polling area in

the afternoon and conversed with a friend waiting in line to vote. He found that this conversation was social in nature and unrelated to the election. The Regional Director also found that another employee who had already voted spoke to voters waiting in line to vote and, in fact, *specifically asked one employee to vote for the Union.*

The Regional Director stated that his investigation disclosed no evidence that either of these employees had any authority to act on behalf of the Respondent Union. He found that the first of the employees described above may have engaged in some activity in support of the Union's campaign. However, according to the Regional Director, the mere fact that the employees were prominent in the Union's organizing campaign was not sufficient to establish that they were agents of the Union. He failed to address the question as to why neither employee was a "representative" of the Union at the time the statements were made.

Threats To Employees.

In his Report and Recommendation on Objections to Election, the Regional Director found that the evidence presented in support of Petitioner's objections concerning threats to employees came from five employees. Two of these employees testified that a business agent for the Respondent Union explicitly threatened them with job loss if they voted against the Union. According to the Regional Director's Report, the business agent denied making these statements. The Regional Director found that, even assuming that these employees are credited, their statements were not sufficient to warrant setting aside the election because neither employee had reason to believe that the Union, in a secret ballot election, could ascertain how each employee voted. Furthermore, the Regional Director held that no employee had reason to believe that the

Petitioner favored the Union and, upon request, was disposed to discharge any employee who voted against the Union. Finally, the Regional Director found that these statements did not have a reasonable tendency to coerce employees in the exercise of their freedom of choice in the election because threats were made to only two employees in a group of 109 and were not alleged to have been communicated to others in the voting group.

In his Report, the Regional Director also found that another employee alleged that, in an attempt to get her to support the Union, a Union agent told her that if there were a strike those who did not support the Union would not have jobs any longer. The Regional Director concluded that this statement could not reasonably be construed to coerce the employee in the exercise of her free choice in the election.

The Regional Director next found that a fourth employee testified that the business agent of the Respondent Union called her on June 6, 1977 and inquired whether she was for the Union and whether she would attend the meeting at evening. According to the Regional Director, she further testified that an hour later she received a phone call from a man who did not identify himself in any way and who said that if she didn't vote for the Union he would see to it that she lost her job. The Regional Director found that while she believed the caller to be the same Union business agent who had called her earlier, she could provide no probative evidence to support this and further she testified that the voice was not distinctive but was "middle of the road". The Regional Director found that, contrary to the statement given by the employee, she could only attribute such threatening remarks to an anonymous telephone caller and that there was no evidence to establish that the Union was responsible for the call.

Finally, in his Report and Recommendations on Objections to Election, the Regional Director found that a Union representative suggested to a fifth employee that he could be replaced by a younger man by the Petitioner during a conversation in which the Union representative attempted to persuade him to vote "yes". The Regional Director likewise found that this statement could not reasonably be construed to coerce the employee in the exercise of his free choice in the election.

Alleged Campaign Misrepresentations.

In his Report and Recommendations on Objections to Election, the Regional Director recited that the Petitioner had presented evidence which indicated that Union agents told employees that the Petitioner owned a nursing home in New Jersey which was very profitable and another facility in Florida for which he was getting a tax deduction. From this the Union allegedly argued to employees that the Petitioner could afford higher wages.

The Regional Director found that when the Petitioner learned of these statements about a week before the election, he told the person who had so informed him that he was losing money at his New Jersey facility and that the Florida facility had been closed two years ago. According to the Regional Director's Report, the Union representatives asserted that while they spoke of the New Jersey home, they did not link it with the Petitioner's ability to pay more wages at the Allentown facility and did not mention the Florida facility during the campaign. The Regional Director found that, even if the Respondent Union had made the misrepresentations attributed to it by the Petitioner, the statements would not warrant the setting aside of the election because the financial condition of the Petitioner's other facilities was not a matter

with regard to which the employees would expect the Union to have authoritative knowledge of the true facts and that the Petitioner had sufficient time to reply to the responding Union's statements. The Regional Director concluded that these statements were not material misrepresentations which would warrant the setting aside of the election.

Certification Of Respondent Union.

On September 28, 1977, the Board issued a Decision and Certification of Representative certifying the Respondent Union with the cryptic notation that it had reviewed the record in light of the (Petitioner's) exceptions and briefs and adopted the Regional Director's Findings and Recommendations, *in toto.*

In order to frame the issues concerning the propriety of the Board's certification of the Respondent Union, the Petitioner refused to bargain with the Union. The Board, after a charge had been filed by the Respondent Union, issued a Decision and Order finding the Petitioner guilty of an unlawful refusal to bargain (Appendix B at pp. 21-32). The Petitioner then filed a Petition for Review with the United States Court of Appeals for the Third Circuit. The Court of Appeals denied the Petitioner's request for oral argument and affirmed without opinion the Decision and Order of the Board (Appendix A at pp. 19-20). It is from the Decision of the Court of Appeals that the within Petition For Writ of Certiorari is filed with this Court.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises The Significant And Recurring Problem Concerning What Constitutes The Existence Of Substantial And Material Factual Issues Which Require The Board To Set An Evidentiary Hearing Before Disposing Of Objections To Elections.

No statutory requirement exists that the Board conduct hearings on objections to representation elections. However, the Board's own Rules and Regulations do provide for a hearing ". . . if it appears to the Regional Director that *substantial and material factual issues exist* which can be resolved only after a hearing, . . ." 29 C.F.R. § 102.69(c). (Emphasis supplied)

The Courts of Appeals have held that in order to require a hearing in a post-election representation proceeding, the objecting party must supply evidence sufficient to make a *prima facie* showing as to facts which, if true, would require the holding of a new election. *Alson Mfg. Aerospace Div. of Alson Industries, Inc. v. National Labor Relations Board,* 523 F.2d 470, 90 LRRM 2520 (9th Cir. 1975); see also *Argus Optics, A Division of Argus, Inc. v. National Labor Relations Board,* 515 F.2d 939, 945-46, 89 LRRM 2280 (6th Cir. 1975); *NLRB v. Carlton McLendon Furniture Company, Inc.*, 488 F.2d 58, 61, 85 LRRM 2177 (5th Cir. 1974); *National Labor Relations Board v. Modine Manufacturing Co.*, 500 F.2d 914, 916, 86 LRRM 3197 (8th Cir. 1974); *National Labor Relations Board v. Southern Paper Box Company,* 473 F.2d 208, 82 LRRM 2482 (8th Cir. 1973).

As the cited cases, as well as many other decided cases, demonstrate, these general rules are easily stated but difficult

of application. Guidance from this Court for the Board to follow in making a determination whether substantial and material factual issues exist is warranted and necessary. The record in the case at bar clearly demonstrates the need for such guidance.

Since the language of the Board's Rules and Regulations (29 C.F.R. § 102.69(c)) requiring the existence of "substantial and material factual issues" is very similar to the requirements of Rule 56 of the Federal Rules of Civil Procedure which provides that summary judgment may be granted only where "no genuine issue as to any material fact" exists, the Petitioner respectfully urges this Court to apply the reasoning, philosophy and judicial precedent applicable to F.R.C.P. Rule 56 to administrative procedures similar to the case at bar. Under such application, issues presented in the case at bar such as agency,[2] state of mind,[3] motive and intent,[4] in most cases could not be disposed of summarily by the Board but only after an evidentiary hearing. As this Court has said:

> "* * *It is only when the witnesses are present and subject to cross-examination that their credibility and weight to be given to their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' "[5]

---

[2] See, *e.g., Dovell v. Arundell Supply Corporation*, 361 F.2d 543 (D.C. Cir. 1966), *cert. den.*, 385 U.S. 841, 87 S.Ct. 93, 17 L.Ed.2d 74 (1966); *Mauk v. Wright*, 367 F.Supp. 961 (E.D.Pa. 1973).

[3] See, *e.g., Croley v. Matson Navigation Company*, 434 F.2d 73 (5th Cir. 1970).

[4] See, *e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

[5] *Poller v. Columbia Broadcasting System, Inc., supra*, at 7 L.Ed.2d at p. 464.

The discussion that follows demonstrates that, unlike in the case at bar, the Courts of Appeals other than the Third Circuit have, in fact, followed the same reasoning in deciding whether substantial and material factual issues exist requiring a hearing in administrative proceedings as they did in deciding whether summary judgment should be issued under F.R.C.P. 56. The Petitioner respectfully urges the Court to specifically adopt this approach and direct its use by the Board and its Regional Directors.

The Petitioner will now discuss the application of the existing law to the facts in the case at bar.

The Agency Or Representative Status Of Two Employers Involved In Electioneering.

With respect to improper electioneering at the polls, the Board established its basic rules in *Milchem, Inc.*, 170 NLRB 362 (1968) when it proscribed last minute electioneering, pressure or an unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots. In *Milchem, Inc., supra*, the Board held that its rule contemplated that conversations between a party, its agents or *representatives* and voters while the latter were in a polling area waiting to vote, would normally, upon the filing of proper objections, be deemed prejudicial without investigation into the contents of the remarks.

In the case at bar, the Petitioner supplied evidence that two employees who had already voted were permitted to return to the polling area and talk to employees waiting in line to vote. The Regional Director's investigation found that one employee's conversation with a prospective voter was merely social in nature. The Regional Director's investigation found that the second employee, who had voted but returned to the

polling area, did ask a prospective voter to vote for the Union. However, the Regional Director found that no evidence existed that these two employees were either agents or representatives of the Respondent Union and for this reason dismissed the Petitioner's objection.

The Regional Director did find in his Report that the employees whose conversation was found to be social in nature had, in fact, engaged in some activity in support of the Union's campaign. In the instance where the other employee had specifically asked a prospective voter to vote for the Union, this action in itself was clear evidence that he was advancing the Union's interests, which in and of itself has been found to be a major factor in finding a representative or agency relationship. See *National Labor Relations Board v. Georgetown Dress Corporation*, 537 F.2d 1239, 92 LRRM 3282, 3285 (4th Cir. 1976); *Colson Corporation v. National Labor Relations Board*, 347 F.2d 128 (8th Cir. 1965).

A determination of whether either of these employees were agents or representatives of the Respondent Union at the time they engaged in the conduct described above, can be made only after their relationship with the Respondent Union has been explored in depth at an evidentiary hearing. For example, in *Fidelity Telephone Company v. National Labor Relations Board*, 573 F.2d 534, 98 LRRM 2014 (8th Cir. 1978) the Court of Appeals affirmed a Report and Recommendations of the Regional Director issued *after a hearing* because the record demonstrated that, although the employee in question did tell others of union organizational meetings, pass out pamphlets and act as a union observer at the first election, she did not undertake any of these activities during the second election. In addition, the Court noted that the employee had never been authorized to speak for the Union, received no compensation from the Union and held no official position with

the Union. Finally, the Court noted that there was no evidence that the Union knew of or condoned the employee's conduct.

In the case at bar, even if the Regional Director had explored these various relationships in his investigation, his findings as to these relationships were not set forth in his Report and Recommendations on Objections to Election and the Court of Appeals had no way of judging whether an investigation was, in fact, made into all of these factors. The blatant electioneering and the presumptively prejudicial extended conversation carried out by these two employees; the fact that one employee was active in the Union's campaign and the other was clearly advancing the Union's interest all established a *prima facie* factual issue as to their status which was not rebutted by any of the findings of the Regional Director.

The Petitioner also calls the attention of the Court to *Beaird-Poulan Division, Emerson Electric Company v. National Labor Relations Board, et al.*, ... F.2d ...., 97 LRRM 2994 (8th Cir. 1978). In that case the employer filed Objections to an election which alleged, *inter alia*, that Union supporters were permitted to stay in the polling area after casting their ballots and campaigning was conducted during the election in violation of the Board's *Milchem* rule. The Court found that the employer had presented *prima facie* evidence in support of its objections through affidavits and held that the Board erred in failing to hold an evidentiary hearing. As in the case at bar, the affidavits contained facts that Union supporters were permitted to stay in the polling area after casting their ballots and that campaigning was conducted. A copy of this unreported opinion is attached hereto in Appendix F at pp. 48-53.

Threats To Employees.

With respect to threats made to employees by Union agents or representatives, the basic rule in this area was articulated by the Board in *Seamprufe, Incorporated*, 82 NLRB 892 (1949) where the Board said that the proper test was whether the statements were reasonably calculated to coerce the members hearing the statements in the exercise of their statutory rights not to join the Union or to refrain from concerted activities on behalf of the Union. In *Seamprufe, Inc., supra*, the Union representative told her audience that when the Union organized the plant "those who do not join the Union will eventually lose their jobs". The Board held that this statement, together with another to the effect that "We have ways of handling people like you that argue with the Union", give the impression of a fixed determination by an organized group represented by the Union representative to take punitive action against anyone who opposed or did not support its program.

In *National Labor Relations Board v. Southern Paper Box Co.*, 473 F.2d 208, 82 LRRM 2482 (8th Cir. 1973), the employer had offered affidavits from five employees which stated that the affiants or other employees had been threatened with loss of jobs, property damages and physical violence unless they continued to support the Union. The persons alleged to have made the threats denied making them. The Board held that, even if the threats had been made, they were not grounds for setting aside the election. The Court of Appeals held that the statements allegedly made were specific and provocative and were communicated to at least fifteen employees out of a total work force of one hundred and seventy and perhaps to many more. The Court held that under such circumstances an adversary hearing was necessary to determine whether the threats were made, how broadly they were communicated and

whether they created an atmosphere of fear and reprisal so as to render a free expression of choice impossible.

The same rules would apply in the case at bar. There were at least two employees whom the Regional Director found had been directly threatened with loss of their jobs if they did not support the Union. Another employee was threatened with a loss of her job by a person on the telephone whom she first identified as the Union representative but apparently in a later conversation with the representative of the Regional Director may have vacillated in her identification of the caller. Two other employees also received statements from the Union's Business Agent which, although the Regional Director found could not have constituted threats, were clearly susceptible of such a meaning. Without an evidentiary hearing, it was impossible for the Regional Director to determine whether the statements were made and, if made, whether they created an atmosphere of fear and reprisal so as to render a free expression of choice impossible. See *National Labor Relations Board v. Souther Paper Box Co., supra.*

Alleged Campaign Misrepresentations.

With respect to the objection concerning misrepresentations, the Board has held that an election will be set aside "where there has been misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have significant impact on the election". *Hollywood Ceramics, Inc.*, 140 NLRB 221, 224 (1962).

In *National Labor Relations Board v. Southern Paper Box Co., supra*, the Court of Appeals said at 82 LRRM 2485:

"Finally, with respect to objection VI, five employee witnesses testified that a Union representative told them that Southern's president had taken bonus money due the employees in 1970 and had used the money to finance a trip to Europe. The Union representative denied making the statement. The Board held that the statement if made was not grounds for setting aside the election because Southern had an adequate opportunity to reply to it and that, in any event, the statement 'constitute[d] permissible campaign propaganda of a type which employees can readily be expected to evaluate for themselves.' Southern denied that the statement was true, and further denied that it had an adequate opportunity to reply to it.

We are simply unwilling to accept the Board's conclusion that such an *ad hominem* accusation at a time when Southern was unable to respond was nevertheless, permissible campaign propaganda which employees could be expected to evaluate for themselves. Thus, the crucial questions are whether or not the statement was made, and whether or not Southern had an opportunity to respond. It is imperative that these disputed factual issues be resolved in an adversary hearing.

In summary, we hold that substantial and material factual issues were raised by Southern's objections II and VI, and that a hearing is necessary to resolve them."

The Court of Appeals for the Ninth Circuit reached an identical result in *Alson Mfg. Aerospace Division Of Alson Industries, Inc. v. National Labor Relations Board, supra.*

The Petitioner submits that it had furnished to the Board, through affidavits, sufficient evidence to present a *prima facie* showing which, if true, would require a new election. As the Court of Appeals noted in *Alson Mfg. Aerospace Division of Alson Industries, Inc. v. National Labor Relations Board, supra,* it was not necessary for the Petitioner to obtain all the evidence required for a new election by way of affidavits but was entitled to an evidentiary hearing on the issues presented in order to determine whether a new election should be held.

Summary.

As the facts in the case at bar illustrate, the Board erred in summarily dismissing the Petitioner's objections to the election. Issues such as the agency or representation status, the impact of threatening statements upon the employees and the effect of misrepresentations upon the employees should not have been disposed of without an evidentiary hearing. Thus, due process in the context of this case requires an evidentiary hearing to resolve these issues.

The Petitioner submits that the Court of Appeals in the case at bar should have followed the action taken by the Court of Appeals for the Sixth Circuit in *Prestolite Wire Division v. National Labor Relations Board,* .... F.2d ...., 100 LRRM 2503 (6th Cir. 1979) (a copy of which appears in Appendix G at pp. 54-70) where the Court held that where, over objection, the Board certification is made without the benefit of a hearing, the Court was justified in taking that record as it found it and construing the well-pleaded factual assertions in the employer's objections most favorably to it. As so viewed, the Court should have considered the Board's decision in this case to have been an abuse of discretion.

In the alternative, the Petitioner contends that the Court of Appeals erred in failing to remand the matter to the Board for an evidentiary hearing to resolve the substantial and material issues of fact.

II

The Decision Below Raises A Conflict Between The Third Circuit And Several Other Circuits.

The action of the Court of Appeals in affirming the Board's Decision and Order in the case at bar is at variance with the action taken under similar factual circumstances by Courts of Appeals in other Circuits as discussed heretofore. The conflict in these decisions demonstrates the need for standards or guidelines to be used by the Board in determining when substantial or material issues of fact are presented by means of affidavits, and the conditions under which the Board is required to conduct an evidentiary hearing before disposing of the objections of any party to an election. This Petitioner and a multitude of other parties to elections find themselves in the middle of a conflict between the Courts of Appeals and the National Labor Relations Board. Because of the importance of expeditious determination of challenges to elections in the scheme of the Federal labor laws, it is imperative for this Court to resolve these conflicts.

Conclusion

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

EDWARD H. FEEGE,
HAYES and FEEGE, P.C.,
2851 W. Emaus Avenue,
Allentown, PA 18103,
Attorneys for the Petitioner,
Bernard Guttman, t/a
Liberty Nursing Center.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1571

BERNARD GUTTMAN, t/a LIBERTY NURSING CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

RETAIL CLERKS LOCAL 1361, CHARTERED BY RETAIL CLERKS INTERNATIONAL UNION, AFL-CIO,
Intervenor.

(Board No. 4-CA-8989, 235 NLRB No. 179)

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Submitted under Third Circuit Rule 12(6)
January 9, 1979

BEFORE: SEITZ, *Chief Judge,* GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by petitioner, respondent, and intervenor, it is

ADJUDGED AND ORDERED that the petition for review be and is hereby denied and that the Board's Cross-Application for enforcement is granted and the order of the Board be and hereby is enforced.

Costs taxed against Petitioner.

By the Court,

SEITZ,
Chief Judge.

Attest:

THOMAS F. QUINN,
Thomas F. Quinn,
Clerk.

DATED: January 15, 1979.

Certified as a true copy and issued in lieu of a formal mandate on February 6, 1979.

Test: THOMAS F. QUINN,

Clerk, United States Court of Appeals for the Third Circuit.

Pursuant to Rule 39(d), F.R.A.P., costs taxed in favor of respondent added hereto on February 9, 1979, as follows:

Brief.....$136.76 M.E.F.

APPENDIX B

Decision and Order of the National Labor Relations Board

(Filed May 5, 1978.)

235 NLRB No. 179 FJP
D—3701
Allentown, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BERNARD GUTTMAN t/a LIBERTY NURSING CENTER,

and

PROFESSIONAL HEALTH CARE DIVISION, RETAIL CLERKS LOCAL 1361, CHARTERED BY RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL—CIO.

Case 4—CA—8989.

Upon a charge filed on October 25, 1977, by Professional Health Care Division, Retail Clerks Local 1361, Chartered by Retail Clerks International Association, AFL—CIO, herein called the Union, and duly served on Bernard Guttman t/a Liberty Nursing Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, issued a complaint on December 6, 1977, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint,

and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 28, 1977, following a Board election in Case 4—RC—12659, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about October 11, 1977, and at all times thereafter, Respondent has refused, and continues to date to refuse to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 22, 1977, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 23, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and for Issuance of Board Decision and Order and a memorandum in support thereof. On March 1, 1978, the Union filed with the Board a Motion in support of the General Counsel's Motion for Issuance of a Board Decision and Order. Subsequently, on March 6, 1978, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent has filed no response to the Notice To Show Cause.

[1] Official notice is taken of the record in the representation proceeding, Case 4—RC—12659, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits that the Board certified the Union as the exclusive representative of employees in the bargaining unit and admits it has refused to bargain with the Union. However, Respondent denies that the Board's Decision and Certification of Representative was properly issued, contending that the conduct of the election and certain conduct affecting the results of the election rendered the election null and void. In addition, Respondent's answer admits that in the past year it had gross revenues in excess of $250,000 and purchased goods valued in excess of $2,000 directly from points outside Pennsylvania, but denies that its business has a substantial relation to trade, traffic, and commerce among the States. The General Counsel contends that the issues now in dispute were determined in the previous representation proceeding, that Respondent's factual admissions establish that its business has a substantial impact upon interstate commerce, and that summary judgment is therefore appropriate. We agree with the General Counsel.

An examination of the entire record, including that in Case 4—RC—12659, discloses that in an election conducted pursuant to a Stipulation for Certification Upon Consent Election the Union was selected as the collective-bargaining representative by a vote of 59 to 44, with 6 ballots challenged.

Respondent filed timely objections to the conduct of the election and to conduct affecting the results of the election, in which it contended that: (1) as the balloting was taking place, two union supporters who had already voted were permitted to engage in conversation in the polling place with employees waiting in line to vote; (2) an employee who was preparing to vote handed a questionnaire distributed by the Union to the Board Agent to give to the union observer. When the Board Agent realized the nature of the document, he took it from the union observer and handed it back to the voter; (3) the Union, through its representatives and employees acting on its behalf, threatened employees with loss of their jobs if they did not vote for the Union; and (4) the Union, through its representatives and employees acting on its behalf, misrepresented the financial condition of the Employer to the employees.

After an investigation, the Regional Director issued a Report and Recommendations on Objections to Election, in which he recommended that the objections be overruled and that the Union be certified. Respondent filed timely exceptions to the Regional Director's report, together with a supporting brief, urging that the election be set aside and that a new election be ordered, or, in the alternative, that a hearing be granted. On September 28, 1977, the Board adopted the findings and recommendations of the Regional Director and certified the Union as the exclusive representative of the employees in the appropriate unit. Since October 11, 1977, Respondent has refused to bargain collectively with the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section

8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

The record reveals that all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding. Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. Additionally, the facts admitted in Respondent's answer demonstrate that its purchases from outside the State affect commerce within the meaning of Section 2(7) of the Act[3] and that it meets the Board's standards for asserting jurisdiction over proprietary nursing homes.[4] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

Findings of Fact

I. The Business of Respondent

Respondent is a sole proprietorship which operates a proprietary nursing home in Allentown, Pennsylvania. During the past year, Respondent had gross revenues in excess of

---

[2] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[3] *E.g., Austin Developmental Center, Inc.*, 226 NLRB 134 (1976); *Jere Fowler, et al. d/b/a Pet Inn's Grooming Shoppe*, 220 NLRB 828 (1975).

[4] *Faye Nursing Home, Inc., d/b/a Green Oak Manor*, 215 NLRB 658 (1974) *University Nursing Home, Inc.*, 168 NLRB 263 (1967).

$250,000 and purchased goods valued in excess of $2,000 directly from points outside Pennsylvania.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Professional and Health Care Division, Retail Clerks Local 1361, Chartered by Retail Clerks International Association, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time nurses aides, medical records employees, LPNs, GPNs, physical therapy and occupational therapy assistants, recreation employees, dietary employees, housekeeping employees, and maintenance employees employed by Respondent at its facility located at 17th and Allen Streets, Allentown, Pennsylvania; but excluding all professional and technical employees, RNs, office clerical employees, guards, and supervisors as defined in the Act.

2. The certification

On June 10, 1977, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 4, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 28, 1977, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 11, 1977, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 11, 1977, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 11, 1977, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Bernard Guttman t/a Liberty Nursing Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Professional Health Care Division, Retail Clerks Local 1361, Chartered by Retail Clerks International Association, AFL—CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time nurses aides, medical records employees, LPNs, GPNs, physical therapy and occupational therapy assistants, recreation employees, dietary employees, housekeeping employees, and maintenance employees employed by Respondent at its facility located at 17th and Allen Streets, Allentown, Pennsylvania; but excluding all professional and technical employees, RNs, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 28, 1977, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 11, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is en-

gaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bernard Guttman t/a Liberty Nursing Center, Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Professional Health Care Division, Retail Clerks Local 1361, Chartered by Retail Clerks International Association, AFL—CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time nurses aides, medical records employees, LPNs, GPNs, physical therapy and occupational therapy assistants, recreation employees, dietary employees, housekeeping employees,

> and maintenance employees employed by Respondent at its facility located at 17th and Allen Streets, Allentown, Pennsylvania; but excluding all professional and technical employees, RNs, office clerical employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility at 17th and Allen Streets, Allentown, Pennsylvania, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily

---

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. May 5, 1978

.....
JOHN H. FANNING, Chairman

.....
HOWARD JENKINS, JR., Member

.....
JOHN A. PENELLO, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

Appendix Attached to Decision and Order

D—3701

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Professional Health Care Division, Retail Clerks Local 1361, Chartered by Retail Clerks International Association, AFL—CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time nurses aides, medical records employees, LPNs, GPNs, physical therapy and occupational therapy assistants, recreation employees, dietary employees, housekeeping employees, and maintenance employees employed by Respondent at its facility located at 17th and Allen Streets, Allentown, Pennsylvania; but excluding all professional and techni-

cal employees, RNs, office clerical employees, guards, and supervisors as defined in the Act.

BERNARD GUTTMAN t/a
LIBERTY NURSING CENTER
(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green, Jr., Federal Building—Room 4400, 600 Arch Street, Philadelphia, Pennsylvania 19106, Telephone 215—597—7601.

APPENDIX C

Decision and Certification of Representative

(Filed September 23, 1977)

NOT INCLUDED FJP
IN BOUND VOLUMES Allentown, Pa.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BERNARD GUTTMAN t/a LIBERTY NURSING CENTER,
Employer,

and

PROFESSIONAL AND HEALTH CARE DIVISION RETAIL CLERKS LOCAL 1361, Chartered by RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO
Petitioner.

Case 4-RC-12659

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held June 10, 1977[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations.

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 59 for, and 44 against, the Petitioner; there were 6 challenged ballots, an insufficient number to affect the results. There were approximately 120 eligible voters.

Appendix C—Decision and Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Professional and Health Care Division Retail Clerks Local 1361, Chartered by Retail Clerks International Association, AFL-CIO and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time nurses aides, medical records employees, L.P.N.'s, G.P.N.'s, physical therapy and occupational therapy assistants, recreation employees, dietary employees, housekeeping employees and maintenance employees; but excluding all professional and technical employees, R.N.'s, office clerical employees, guards and supervisors as defined in the Act.

Dated Washington, D.C., September 28, 1977.

.....
JOHN H. FANNING, Chairman

.....
HOWARD JENKINS, JR., Member

.....
JOHN A. PENELLO, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

Report and Recommendations on Objections to Election

(Filed July 21, 1977)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

BERNARD GUTTMAN t/a LIBERTY NURSING CENTER,
Employer,

and

PROFESSIONAL AND HEALTH CARE DIVISION RETAIL CLERKS LOCAL 1361, Chartered by RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner.

Case No. 4-RC-12659

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director on May 11, 1977, an election by secret ballot was conducted on June 10, 1977, in the unit described in paragraph 12 of the Stipulation. The Tally of Ballots, copies of which were served upon the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	120
Void ballots	0
Votes cast for Petitioner	59
Votes cast against participating labor organization	44
Valid votes counted	103
Challenged ballots	6
Valid votes counted plus challenged ballots	109

The challenged ballots are not sufficient to affect the results of the election.

On June 15, 1977, the Employer timely filed and served the following Objections to Conduct Affecting the Results of the Election:

1. As the balloting was taking place, two employees, who were supporters of the Union and had already voted, were permitted to engage in conversation in the polling place with employees waiting in line to vote.

2. An employee who was preparing to vote handed a paper to the Board Agent to give to the Union Observer. The paper was a questionnaire distributed by the Union asking the employees what changes in wages and fringe benefits they wanted in collective bargaining with the Employer. The Board Agent handed the paper to the Union Observer. When he realized the nature of the paper, he took it back and handed it to the voter.

3. The Union, through its representatives and employees acting on its behalf, threatened employees with loss of their jobs if they did not vote for the Union.

4. The Union, through its representatives and employees acting on its behalf, misrepresented the financial condition of the Employer to the employees.

Pursuant to paragraph 7 of the Stipulation and Section 102.69(c) of the Board's Rules and Regulations, an investigation of the Objections was conducted under the direction and supervision of the Regional Director. During the investigation, each party was afforded the opportunity to present witnesses and evidence relevant to the issues raised by

the Objections. The investigation disclosed and the undersigned reports as follows:

OBJECTION 1 alleges that two employees who were supporters of the Union engaged in conversation in the polling area with employees who were waiting in line to vote. In support of this objection, the Employer presented two witnesses who testified to seeing Mary Frey and Lewis Calcasacco talking to voters waiting in line to vote even though Frey and Calcasacco had already voted. However, the Employer presented no evidence as to the content of these conversations.

The investigation revealed that Frey, who had voted in the morning session, returned to the polling area in the afternoon and conversed with a friend waiting in line to vote. However, this conversation was social in nature and unrelated to the election. There was evidence, however, that Calcasacco did, in fact, ask one employee to vote for the Union. However, the investigation disclosed no evidence that either of these employees had any authority to act on behalf of the Petitioner.

The Board has held that last minute electioneering by the parties or their representatives within the polling area may, in certain circumstances, warrant setting aside an election. *Milchem, Inc.*, 170 NLRB 362. However, to have such an effect, the conduct must be attributable to the parties or their representatives. *Equitable Equipment Co., Inc.*, 178 NLRB 302, 314. Although it appears that one of these employees may have engaged in some activity in support of the Union's campaign,[1] it is well established that the mere fact that employees

[1] The Employer presented no evidence concerning Calcasacco's activities on behalf of the Petitioner.

are prominent in the Union's organizing campaign is not sufficient to establish that they are agents of the Union. *Owens Corning Fiberglass Corp.*, 179 NLRB 219. Accordingly, I find that Objection 1 lacks merit.

OBJECTION 2 alleges that a voter attempted to give a piece of paper to the Union observer at the polling table. The Board agent at the table inquired as to the content of this paper. The Employer's observer told the Board Agent that it was a questionnaire circulated by the Union to employees soliciting their suggestions on improved wages and benefits to be obtained in collective bargaining. The Board Agent immediately took the paper, which had remained folded throughout this course of events, and returned it to the voter, advising her that she could not give the paper to the observer at this time. As there is no evidence that this incident could in any way affect the outcome of the election, I find that Objection 2 lacks merit.

OBJECTION 3 alleges that the Union, through its representatives and employees acting on its behalf, threatened employees with loss of their jobs if they did not vote for the Union. The evidence presented in support of this objection came from five employees. The first employee stated that a union representative suggested to him that he could be replaced by a younger man by the employer during a conversation in which the union representative attempted to persuade him to vote yes. However, the representative made no threat, explicitly, or implicitly, that this would happen if he did not vote for the Union, or that the Union could or would effectuate his discharge.

Another employee alleged that in an attempt to get her to support the union, a Union agent told her that if there were a strike, those who did not support the Union would not have their jobs any longer.

Another employee testified that she received a telephone call from someone who identified himself as being from the Union, but did not identify himself further. He allegedly stated to her that she might possibly lose her job if she did not vote for the Union. She responded that, in effect, she didn't think that would happen as she viewed the Employer as having the exclusive power to do so.

Another employee testified that Ray Stubblefield of the Union called her on June 6, 1977 and inquired whether she was for the Union and whether she would attend a meeting that evening. She further testified that an hour later, she received a telephone call from a man who did not identify himself in any way and who said that if she didn't vote for the Union, he would see to it that she lost her job. While she believed the caller to be Stubblefield, she could provide no probative evidence to support this and further, she testified that the voice was not distinctive but was "middle of the road". He never explained to her how the Union would ascertain her choice, or how the union could obtain the power to carry out its intentions.

Lastly, another employee said that in a conversation at her home, Stubblefield told her twice that those who voted "no" would lose their jobs. In response she told him to take her job because she didn't need it as badly as the other girls. Stubblefield allegedly explained to her that the Union had ways of discovering how she would vote, but did not explain how she would lose her job if she voted against the Union.

Stubblefield testified that he spoke to many employees during the campaign, both in person and by telephone. However, he denies that any employees were threatened with job loss if they did not support the Union.

A threat to employees by a Union that they will lose their jobs if they do not vote for the union in a representation election may, in certain circumstances, be the basis for setting aside the election. *Superior Wood Products, Inc.*, 145 NLRB 782. As in similar threats, to have this effect, the statements must be reasonably calculated to coerce members in the exercise of their rights not to join the Union. *Seamprufe, Inc.*, 82 NLRB 892. In addition, the statements must be made by or otherwise attributable to the Union. *Kay Bee Export*, 222 NLRB 194.

In view of the foregoing, the statements to the first three employees are not sufficient to warrant the setting aside of the election. With respect to the first two employees, the statements, respectively, that an employee could be replaced by a younger person, and that in the event of a strike, an employee's non-support could cost her her job, could not reasonably be construed to coerce employees in the exercise of their free choice in the election. The third employee can only attribute such threatening remarks to an anonymous telephone caller, and there was no evidence to establish that the Union was responsible for the call. *Retail Store Employees Union Local 428, Retail Clerks International Association (Levitz Furniture Company)*, 204 NLRB 1046, 1053.

The remaining two employees testified that the Union business agent explicitly threatened them with job loss if they voted against the Union. The Agent denies making these statements. Even assuming, however, that the employees are to be credited, the statements made are not sufficient to

warrant setting aside the election. Neither employee had reason to believe that the Union, in a secret ballot election, could ascertain how she voted. Furthermore, no employee had reason to believe that the Employer favored the Union and on request was disposed to discharge any employee who voted *against* the Union. *Jamler Plastic Mold Corporation*, 186 NLRB 540. In these circumstances, I find that these statements do not have a reasonable tendency to coerce employees in the exercise of their freedom of choice in the election. Moreover, the threats were made to only two employees in a unit of 109 employees and were not alleged to have been communicated to others in the voting group. As such, the atmosphere in which the election was conducted could not have been sufficiently tainted to affect the employees' free choice. *Anaconda Aluminum Company*, 206 NLRB 227, fn. 2. Accordingly, I find that Objection 3 lacks merit.

OBJECTION 4 alleges that the Union, through its agents, misrepresented the financial condition of the Employer to the employees. The Employer presented evidence which indicated that Union agents told employees that the Employer owned a nursing home in New Jersey which was very profitable, and another facility in Florida for which he was getting a tax deduction. From this, the Union allegedly argued to employees that the Employer could afford to pay higher wages. When the Employer learned of these statements about a week before the election, he told the person who so informed him that he was losing money at his New Jersey facility and that the Florida facility had been closed two years ago. Union representatives asserted that while they spoke of the New Jersey home, they did not link it with the Employer's ability to pay more wages at the Allentown facility, and did not mention the Florida facility during the campaign.

I find that even if the Union had made the misrepresentations attributed to it by the Employer, the statements would not warrant setting aside the election. In this connection, it should be noted that the financial condition of the Employer's other facilities was not a matter with regard to which the employees would expect the Union to have authoritative knowledge of the true facts. In any event, the Employer had sufficient time to reply to the Union's statements. Thus, these statements are not material misrepresentations which would warrant setting aside the election either under the Board's recently overruled *Hollywood Ceramics* rule[2] or its current *Shopping Kart* holding.[3] Accordingly, I find that Objection 4 lacks merit.

RECOMMENDATIONS

Having found that the Employer's Objections lack merit, I recommend that they be dismissed,[4] and that an appropriate Certification of Representative issue.

Dated at Philadelphia, Pennsylvania, this 21st day of July, 1977.

FRANCIS W. HOEBER,
Francis W. Hoeber, Acting Regional
Director for the Fourth Region
National Labor Relations Board.

---

[2] *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

[3] *Shopping Kart Food Market, Inc.*, 328 NLRB No. 190.

[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by August 3, 1977.

APPENDIX E

Provisions of the National Labor Relations Act, As Amended

* * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * *

APPENDIX F

Unreported Opinion—Beaird-Poulan Division v. NLRB

BEAIRD-POULAN DIVISION v. NLRB

U.S. Court of Appeals,
Eighth Circuit (St. Louis)

BEAIRD-POULAN DIVISION, EMERSON ELECTRIC COMPANY v. NATIONAL LABOR RELATIONS BOARD, and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Intervenor, No. 77-1518, March 2, 1978

LABOR MANAGEMENT RELATIONS ACT

Representation election—Objections—Evidentiary hearing ►62.5637 ►62.5633 ►62.5695

NLRB held not warranted in refusing to set aside representation election that union won by narrow margin without conducting evidentiary hearing on employer's objections that union precluded employees from expressing their free choice in non-coercive atmosphere by (1) conducting campaign of fear and intimidation, including predictions of violence and economic detriment to employees opposed to union, (2) making substantial misrepresentations with respect to compensation, stock options and benefits of officials and supervisors, (3) making misrepresentations with respect to its alleged contractual relationship with another employer, and (4) permitting union supporters to stay in polling area after casting their ballots; employer presented specific allegations of misconduct sufficient to warrant setting aside election, if true.

Petition for review and cross-application for enforcement of an NLRB order (95 LRRM 1286, 229 NLRB No. 143). Enforcement denied; matter remanded.

D. Michael Linihan and Ralph E. Kennedy (McMahon, Berger, Breckenridge, Hanna, Linihan & Cody), St. Louis, Mo., for employer.

Ellen P. Spangler (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and John H. Ferguson, with her on brief), for NLRB.

Lynn A. Agee (Youngdahl, Larrison & Agee), Memphis, Tenn., filed brief for union.

Before GIBSON, Chief Judge and ROSS and HENLEY, Circuit Judges.

Full Text of Opinion

ROSS, Circuit Judge: — Beaird-Poulan Division, Emerson Electric Company (the company), petitions this court for review of an order of the National Labor Relations Board finding that it is engaging in unfair labor practices within the meaning of §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1); ordering it to cease and desist from refusing to bargain collectively with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the union); and ordering it to take certain affirmative action. The Board cross-petitions for enforcement of its order. The union was permitted to intervene and it also requests that the Board's order be enforced.

This case arises out of an intense and vigorous representative campaign and a close election. On March 19, 1976, the union filed a petition seeking certification as the bargaining representative of the production and maintenance employees at the company's Shreveport, Louisiana,[1] plant. An election was held on April 30, 1976, pursuant to a stipulation for certification upon consent election, and the union won by the narrow margin of 402-383.

The company filed timely objections to alleged misconduct by the union which it contends affected the results of the election. After investigating, but without conducting a hearing, the Regional Director issued his report recommending that the objections be overruled and the union be certified. Filing timely objections to the Regional Director's report, the company requested a hearing. However, on November 23, 1976, the Board denied the hearing request, adopted the Regional Director's finding, and certified the union.

Thereafter, the company refused the union's bargaining request and the union filed an unfair labor practice charge with the Board. On May 25, 1977, the Board granted the General Counsel's motion for summary judgment, finding that the company had presented no material facts which had not previously been determined.

The company alleges that the following misconduct by the union impermissibly affected the outcome of the election:

1. The Union conducted a campaign of fear and intimidation, including predictions of violence and economic

[1] Beaird-Poulan Division, Emerson Electric Company is a Missouri corporation with headquarters in St. Louis, so this court has jurisdiction.

detriment to employees opposed to the Union which permeated the entire atmosphere in such a manner as to destroy the laboratory conditions required by the Board in its election proceedings.

2. The Union made substantial misrepresentations with respect to the compensation, stock options and benefits of officials and supervisors of the Employer.

3. The Union made substantial misrepresentations with respect to its alleged contractual relationship with Huck Manufacturing Co. of Waco, Texas. The Union misrepresented wage rates being paid employees at Huck Manufacturing Co.

4. Union supporters were permitted to stay in the polling area after casting their ballots and campaigning was conducted during the election in violation of the Board's "Milchem Rule".

5. By the above and other acts and conduct, the Union precluded the employees from expressing their free choice in a non-coercive atmosphere. It contends, in light of these allegations, that the Board erred in concluding that the election should not be set aside. Alternatively, it requests a hearing by the Board to resolve these issues.

Although we make no factual findings with regard to the alleged misconduct, we do find that the company presented specific allegations of misconduct sufficient to warrant setting aside the election, if true, and is entitled to an evidentiary hearing. We remand the case to the Board and order that a hearing be held.

In its ruling on the General Counsel's motion for summary judgment the Board correctly stated the constitutional and statutory standard to be met before a party is entitled to a hearing on its objections to the conduct of a representative election. To be entitled to a hearing, the requesting party must raise substantial or material issues which, if proved, would warrant setting aside the election. NLRB v. Modine Manufacturing Co., 500 F.2d 914, 916, 86 LRRM 3197 (8th Cir. 1974), and cases cited therein. See also Argus Optics v. NLRB, 515 F.2d 939, 945-46, 89 LRRM 2280 (6th Cir. 1975); NLRB v. Carlton McLendon Furniture Co., Inc., 488 F.2d 58, 61, 85 LRRM 2177 (5th Cir. 1974); NLRB v. Skelly Oil Co., 473 F.2d 1079, 1083, 82 LRRM 2641 (8th Cir. 1973). The Board found, however, that the company failed to raise such substantial or material issues in the underlying representation case. We disagree.

The company submitted sworn affidavits of company employees describing incidents of violence and intimidation,[2] which, if true, warrant the setting aside of the election. Cf. Wilkinson Manufacturing Co. v. NLRB, 456 F.2d 298, 303, 79 LRRM 2602 (8th Cir. 1972). The Regional Director's report indicates that he talked with the employees involved and resolved factual disputes and credibility conflicts in favor of the company. However, this court has held that the company must be afforded the opportunity to produce evidence that might rebut testimony of union witnesses or at least subject

[2] Examples of alleged violence and intimidation include: a statement that one employee brandished a gun after receiving an anti-union handbill; a threat to one employee that her "kids could come up missing or get hurt;" a union supporter forcing another employee's car off the road; and an employee's windows broken after he refused to act as a union in-plant organizer.

those witnesses to the "cleansing rigors of cross-examination." NLRB v. Commercial Letter, Inc., 455 F.2d 109, 113-14, 79 LRRM 2267 (8th Cir. 1972). That opportunity was not afforded Beaird-Poulan.

Similarly, the company has presented *prima facie* evidence of other misconduct sufficient to set aside the election, if true. Cf. Hollywood Ceramics, 140 NLRB 221, 51 LRRM 1600 (1962) (unfair comparison of wage rates on the eve of the election); Argus Optics v. NLRB, supra, 515 F.2d 939, 89 LRRM 2289 (misrepresentation concerning the extent to which employees share equitably in the products of their labor); Milchem, Inc., 170 NLRB 362, 67 LRRM 1395 (improper electioneering during the course of the election). The allegations cannot be rejected by the Board without affording the company a hearing on the issues. See Argus Optics v. NLRB, supra, 515 F.2d 939; 89 LRRM 2289; NLRB v. Skelly Oil Co., supra, 473 F.2d 1079, 82 LRRM 2641. The company has presented serious, substantial allegations, not "nebulous and declamatory assertions, wholly unspecified." See United States Rubber Co. v. NLRB, 373 F.2d 602, 606, 64 LRRM 2393 (5th Cir. 1967), quoting Fay v. Douds, 172 F.2d 720, 23 LRRM 2356 (2d Cir. 1949).

In our opinion the company's objections lead to the conclusion that substantial and material factual issues sufficient to warrant setting aside the election may exist and an evidentiary hearing is required.

The cross-application of the Board for enforcement of its order is denied and the case is remanded for a hearing on the alleged misconduct in the representative election.

APPENDIX G

Opinion—Prestolite Wire Div. v. NLRB.

PRESTOLITE WIRE DIV. v. NLRB

U.S. Court of Appeals
Sixth Circuit (Cincinnati)

PRESTOLITE WIRE DIVISION v. NATIONAL LABOR RELATIONS BOARD, No. 76-2037, January 31, 1979.

LABOR MANAGEMENT RELATIONS ACT

Representation election—Certification of union—Abuse of discretion ►62.659 ►62.5595.

NLRB abused its discretion in certifying union that won representation election by narrow margin, where Board's certification was made without benefit either of evidentiary hearing on employer's exceptions to report and recommendation of Board's regional director on employer's objections to election or of full record compiled by and relied upon by investigative officer.

Petition for review and cross-application for enforcement of an NLRB order (92 LRRM 1431, 225 NLRB No. 1). Petition granted; enforcement denied.

Eugene T. D'Ablemont (Kelley Drye & Warren), New York, N.Y., for appellant.

Robert G. Sewell (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and Linda Dreeben, with him on brief), for respondent.

Before EDWARDS, Chief Judge, and WEICK and ENGEL, Circuit Judges.

Full Text of Opinion

ENGEL, Circuit Judge:—This matter is before the court on petition of Prestolite Wire Division of Eltra Corporation (Prestolite) to review an order of the National Labor Relations Board issued June 24, 1976. Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f) (1976). The Board's order is reported at 225 NLRB No. 1, 92 LRRM 1431 (1976). The Board has cross-petitioned for enforcement of the same order.

On May 28, 1975 the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) filed with the Board a petition for a representation election at Prestolite's plant in Rose City, Michigan. Following approval by the Regional Director of a Stipulation for Certification upon Consent Election, an election was conducted on July 3, 1975 among the company's production and maintenance employees. Of approximately 118 eligible voters, 114 voted, 59 in favor of the union and 55 against union representation.

On July 11, 1975 Prestolite filed objections to the election. The objections, eight in number, are appended to this opinion and concern, *inter alia,* alleged threats made by a union organizer, alleged misrepresentation by the union of the operation of Prestolite's bonus plan, claims that the union had falsely represented that it had obtained free dental and eye care in a bargaining contract in one of Prestolite's plants in Bay City, Michigan, and claims that the election itself had been improperly conducted by a Board agent. The objections were supplemented by ten affidavits from voting employees and one affidavit from the employer's director of employee communications, and by certain correspondence from the

union which identified the union's "in-plant" organizers, some of whom were alleged to have participated in the misconduct.

An administrative investigation by an NLRB Board Agent followed at which Prestolite made available to the agent eight additional affidavits relating to the same charges and given by Prestolite's supervisors and managers. See 29 C.F.R. § 102.69. While they have not been identified or made available, affidavits were also taken by the Board agents from other employees, organizers and representatives of the union.[1]

On September 11, the Regional Director issued a report and recommendation that the objections be overruled in their entiretv without a hearing and that the union be certified as exclusive bargaining representative of the employees. On October 2, 1975 Prestolite timely filed with the Board in Washington its 73 exceptions to the report and recommendation. The exceptions referred in great detail to the findings and conclusions in the report and to the affidavits which had been filed with the Board agent.

On January 30, 1976 a three-member panel of the Board certified the UAW as the exclusive representative of the employees in the bargaining unit. The order and certification in paragraph 5 of its findings recited:

> The Board has considered the Regional Director's report, the Employer's exceptions and brief, and the *entire record* in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Regional Director. (Footnotes omitted.) (Emphasis added.)

[1] The company made no effort to discover the identity of those affiants or the nature of their statements. See generally NLRB v. Robins Tire & Rubber Co., ... U.S. ....., 98 S. Ct. 2311, 98 LRRM 2617 (1978). It also urged that if the Regional Director did not immediately set aside the election and schedule a new one, he should at the least set the matter down for hearing.

Prestolite's subsequent refusal to bargain with the union and the order to bargain which followed frame the issues for judicial review in this court.

In its petition for review Prestolite complains both of the result reached on the merits by the Board and of the procedures employed to reach it, procedures which, it asserts, failed to follow the Board's own rules and resulted in unfairness amounting to a denial of due process.

Prestolite asserts, and the Board does not deny, that the consent election was held pursuant to 29 C.F.R. § 102.62(b):

> Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70.

The procedures for the processing of objections to the election or to conduct affecting the results of the election are governed by 29 U.S.C. § 102.69, which provides in pertinent part:

> (c) If objections are filed to the conduct of the election or conduct affecting the results of the election, . . . the regional director shall, consistent with the provisions of § 102.69(d), investigate such objections or challenges, or both. If a consent election has been held pursuant to § 102.62(b), the regional director shall prepare and cause to be served on the parties a report on . . . objections, . . . including his recommendations, which report . . . he shall forward to the Board . . ., any party may file with the Board . . . eight copies of exceptions to such report, with supporting brief if desired. . . . Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together with a copy of any brief filed on the other parties and shall file copies with the regional director. . . . If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. . . .
>
> (d) The action of the regional director in issuing a report on objections . . . following proceedings under § 102.62(b) or § 102.67 . . . may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. . . .

* * *

> (l) In a case involving a consent election held pursuant to § 102.62(b), if exceptions are filed, . . . and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other dispositions of the case. If it appears to the Board that such exceptions raise substantial and material factural [sic] issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer. . . .

Section 102.69(g) describes the record to be transmitted to the Board:

> (g) The notice of hearing, motions, rulings, order, stenographic report of the hearing, *stipulations, exceptions, documentary evidence,* together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, *shall constitute the record in the case.* Materials other than those set out above shall not be a part of the record; except that in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request

for review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision. Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, *the regional director shall transmit the record to the Board.* (Emphasis added.)

Prestolite claims that it was not until after the Board's order of January 30, 1976 that it discovered that the Regional Director had not transmitted to the Board any of the 19 affidavits which the company had submitted to the investigating officer, nor, presumably, had he transmitted any of the other materials which had been gathered during the course of the administrative investigation. It therefore appears (and the Board does not deny) that the latter's order of January 30, 1976, did not, as stated therein, include a consideration of "the entire record in this proceeding," but was confined to a consideration of the Regional Director's report and recommendation and of the exceptions filed thereto by the company. This, the company contends, amounts at best to an abdication of the Board's responsibility to review the record made and at worst to a deprivation of due process.

For its part, the Board vigorously contends that the existing regulations do not require it to make a *de novo* review and that it may, in the exercise of its discretion, proceed to a decision without the transmission to it of the full investigative record. Put another way, the Board insists that it may determine that no hearing is required without a direct review of the materials

submitted to the Regional Director if it appears from the report and objections that no substantial and material factual issues exist which would require a hearing to resolve them. In this respect the Board relies upon the language of 29 C.F.R. § 102.69(d) and upon our decisions in NLRB v. Wolverine World Wide, Inc., 477 F.2d 969, 971-72, 83 LRRM 2309 (6th Cir. 1973); NLRB v. Medical Ancillary Services, Inc., 478 F.2d 96, 97-98, 83 LRRM 2059 (6th Cir. 1973); and NLRB v. Tennessee Packers, Inc., 379 F.2d 172, 178, 65 LRRM 2619 (6th Cir.), cert. denied, 389 U.S. 958, 66 LRRM 2507 (1967).

While we reaffirm the viability of the decisions cited as holding that in a proper case, objections to an election may be resolved on the basis of an administrative investigation alone, we cannot agree that those cases justify the denial to petitioner of a hearing here.

Without expressly ruling that the Regional Director is invariably required under Section 102.69(g) to transmit to the Board all of the materials considered by him (although the language says "shall"), we think that the better practice is to do so and we are unable to fault the company for having failed to anticipate that this procedure would not have been followed here. It is true that subsection (g) does permit the party filing exceptions to "append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision." We cannot, however, construe this language to shift from the Regional Director to the petitioner the responsibility for assembling and transmitting the record. The mechanics for such a transmission are lacking and we believe that the Board's review would be more reliably facilitated by following the plain language of its rule. In addition, the

petitioner would be entirely without power to transmit the employee affidavits which the investigating officer had obtained.

It is no doubt true that in a given case, as in Tennessee Packers, the objections themselves may be "shotgunned" and so lacking in factual detail that they may be denied both by the Regional Director and by the Board entirely without recourse to the administrative record. Here, however, the Director's report and recommendation referred not only to the affidavits and documentary evidence submitted by the petitioner, but also to affidavits and other evidence which were not made available to Prestolite and which neither it nor the Board has yet seen.[2] It is apparent to us that any fair consideration of the 73 objections filed by Prestolite would be impossible without review of the underlying documentation. As we stated in NLRB v. Tennessee Packers, Inc., supra:

> It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. . . .Mere disagreement with the Regional Director's reasoning and conclusions do [sic] not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing. To request

[2] It was impossible for the Board to have reconciled the report with the objections or, in our opinion, to have evaluated the probity of the objections without repair to the full administrative record.

> a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof. (Citations omitted.)

379 F.2d at 178, 65 LRRM at 2622-2623.

Applying the rule of Tennessee Packers we believe it is most apparent that the exceptions register far more than "mere disagreement with the Regional Director's reasoning and conclusions" and we are unpersuaded by the Board's assertion that the company had failed to present to it "specific assertions of error, substantiated by offers of proof."

It had to be apparent that serious factual disputes existed which could be resolved only by an evidentiary hearing, and which, if resolved in favor of Prestolite, could result in setting aside the election. This observation is especially true concerning the charges that the union agents had misrepresented the benefits it had obtained in one of petitioner's other plants.

Even if the failure of the Regional Director to transmit the record before him to the Board does not expressly violate his obligation under Section 102.69(g), the problems faced by the Board in its review and by this court in ours are vastly complicated by such a procedure.

We are, therefore, left with the dilemma of reviewing a decision of the Board without an adequate record because the Board itself had no such record before it.

The Regional Director, in making his report, relied upon evidence which was unavailable to petitioner and which has not been made available either to the Board or to us. His

report makes factual determinations, credibility findings and dubiously-colored characterizations whose fairness and accuracy are impossible for either the Board or us to review. The potential for mischief in such a procedure must be altogether apparent. Our record is incomplete, as was the Board's, and we cannot consider its augmentation before us by petitioner's unilateral inclusion in the appendix of copies of the Prestolite affidavits a satisfactory substitute.

Where, over objection, the Board's certification is made without the benefit either of a hearing or of the full record compiled by and relied upon by the investigative officer, we believe we are justified in taking that record as we find it, and in construing the well-pleaded factual assertions in Prestolite's objections most favorably to it. So viewed, the Board's decision to issue a certification must be considered an abuse of its discretion.

Accordingly, the Board's Petition to Enforce is denied, the certification set aside, and the cause remanded to the Board with directions to refer the matter for hearing before a hearing officer as provided in 29 C.F.R. § 109.69(f).

EMPLOYER'S OBJECTIONS

1. On election day, July 3, 1975, at the beginning of the day shift work, approximately 7:05 A.M., an identified employee organizer for Petitioner addressed other employees with threat of offensive bodily contact if they did not vote for the Union and thereby coerced and intimidated eligible voters.

2. Petitioner's organizers stated to employees that certainly [sic] monthly bonus payments received by employees during April and May had been falsified by the Employer and

had not been paid in accordance with the written bonus plan formula, and that bonus payments would cease after the election if the Union lost the election. Such statements were false and misleading to employees eligible to vote in the election, the monthly bonus payments were of vital concern to voting employees, and lack of knowledge of Petitioner's falsehoods and misrepresentations prevented Employer from making an effective reply. Petitioner's false and misleading statements had a significant impact on voting employees and prevented the Board from conducting the election under the laboratory conditions it requires.

3. Petitioner's organizers created and perpetuated an atmosphere of coercion and personal intimidation in soliciting employee signatures on Petitioner's authorization cards by telling individual employees that if the individual did not sign the card, then their signature would be forged and used by Petitioner. Such conduct by Petitioner's organizers prevented eligible voters from exercising their franchise under the laboratory conditions required in Board conducted elections.

4. Petitioner compensated employee organizers for Petitioner by providing expense money payments which exceeded expenses, which compensation was not disclosed to employees eligible to vote in the election.

5. An employee organizer for the Petitioner made false and misleading statements to employees eligible to vote in the election regarding the existence of certain fringe benefits that Petitioner had achieved in bargaining for employees represented by Petitioner at an Eltra Corporation facility in Bay City, Michigan. Employees eligible to vote in the election were not and had no reason to be aware of the material facts which Petitioner's agent misrepresented and the Employer

was prevented from making an effective reply by lack of knowledge that the misrepresentations had occurred.

6. The Board Agent conducted the election improperly in permitting voters to congregate so that the ballot box could not be observed by the Agent or the designated Observers while groups of six to eight voters clustered within arms reach of the ballot box.

7. The Board Agent improperly conducted the election by permitting unnecessary and excessive talking, laughing and general noise creation by identified employee organizers for Petitioner while standing in line prior to voting near the voting booth.

8. The Board Agent improperly conducted the election by permitting a voter to exit the voting booth and approach and converse with Petitioner's Observer in view of other eligible voters who were waiting to cast ballots. This improper conduct, including that described in items six and seven above, prevented eligible voters from making a free and uncoerced choice at the polls and impaired the integrity of the election process.

Dissenting Opinion

EDWARDS, Chief Judge, dissenting:

The United Automobile Workers conducted an organizing campaign at Prestolite Division of Eltra Corporation's plant at Rose City, Michigan. It won an election as collective bargaining representative of the employees by a vote of 59 to 55. After the election the company filed objections to certification of the results on eight separate grounds, each of which was rejected by the Regional Director after an investigation in a report and recommendation to the NLRB.

Petitioner then presented detailed exceptions to the report and recommendation of the Regional Director, but did not attach sworn affidavits to support them. The National Labor Relations Board was convinced by the Regional Director's report and certified the UAW as collective bargaining representative. This resulted in the present petition for review by Eltra and cross-application for enforcement by the Board.

Petitioner's principal exceptions do not appear to me to dispute matters of fact, as opposed to the interpretation of the impact or the legal effect of the facts concerned. I am persuaded that the Regional Director's treatment of the objections was proper and that under this court's opinion in NLRB v. Tennessee Packers, Inc., 379 F.2d 172, 65 LRRM 2619 (6th Cir.), cert. denied, 389 U.S. 958, 66 LRRM 2507 (1967), the Board was entitled to reject Eltra's exceptions without a hearing.

In Tennessee Packers this court said:

> In order to raise "substantial and material factual issues", it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Director. N. L. R. B. v. National Survey Service Inc., 361 F.2d 199, 61 LRRM 2712 (C.A. 7); N. L. R. B. v. J. R. Simplot Company, 322 F.2d 170, 54 LRRM 2005 (C.A. 9); Macomb Pottery Company v. N. L. R. B., 376 F.2d 450, 65 LRRM 2055 (C.A. 7); N. L. R. B. v. J.J. Collins' Sons, Inc., 332 F.2d 523, 56 LRRM 2375 (C.A. 7); N. L. R. B. v. Sun Drug Co., 359 F.2d 408, 62 LRRM 2063 (C.A. 3). It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must

state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. N. L. R. B. v. National Survey Service, Inc., supra; N. L. R. B. v. J. R. Simplot Company, supra; Macomb Pottery Company v. N. L. R. B., supra. Mere disagreement with the Regional Director's reasoning and conclusions do not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing. To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof.

The purpose behind the rule which requires a hearing only when "substantial and material factual issues" are raised is to avoid lengthy and protracted proceedings, and eliminate unnecessary delays in certifying the results of an election. If a hearing is required to be held on all exceptions to an election or report of a Regional Director, it would unduly lengthen and prolong labor unrest, contrary to the very purposes of the National Labor Relations Act. The cases relied upon by respondent in support of its contention that it is entitled to a hearing, all deal with cases in which the court determined that "substantial and material factual issues" were raised, and therefore held that the Board erred in not ordering a hearing. United States Rubber Company v. N. L. R. B., 373 F.2d 1602, 64 LRRM 2393 (C.A. 5); N. L. R. B. v.

Capitol Bakers, Inc., 351 F.2d 45, 60 LRRM 2149 (C.A. 3); N. L. R. B. v. Joclin Mfg. Co., 314 F.2d 627, 52 LRRM 2415 (C.A. 2); N. L. R. B. v. Lord Baltimore Press, Inc., 300 F.2d 671, 49 LRRM 2905 (C.A. 4); N. L. R. B. v. Dallas City Packing Co., 230 F.2d 708, 37 LRRM 2637 (C.A. 5); N. L. R. B. v. Poinsett Lumber and Mfg. Co., 221 F.2d 121, 35 LRRM 2736 (C.A. 4). In N. L. R. B. v. Sidran, 181 F.2d 671, 26 LRRM 2043 (C.A. 5), cited by respondent, the Court could only have held that the Board erred in denying a hearing if "substantial and material factual issues" were raised.

Respondent's exceptions to the report of the Regional Director filed December 13th, as heretofore described, do not state specific objections or indicate that material factual issues exist. They do not clearly put in issue the correctness of the Director's findings, but merely attack the correctness of his conclusions and inferences drawn from the facts uncovered in his investigation. It was proper for respondent to question the conclusions of the Director, but to require a hearing it was incumbent upon it to state what evidence it would produce to establish that the conclusions were incorrect. Respondent fails to suggest any material facts which would be developed at a hearing. A hearing "would not deal with matters of factual proof but would serve only to permit argument which could as well have been presented in the writing itself." N. L. R. B. v. J. R. Simplot Company, supra.

Id. at 178, 65 LRRM at 2622-2623.

In NLRB v. O.K. Van Storage, Inc., 297 F.2d 74, 49 LRRM 2218 (5th Cir. 1961), the Fifth Circuit said:

> The National Labor Relations Act, as amended, declares that it is the policy of the United States to encourage establishment of the collective bargaining relationship; the Act then specifies the procedures by which the relationship is to be established. No where in the Act is there a specific requirement that the Board conduct post-election hearings on objections to the conduct of elections; rather, it is implicit in the Act that questions preliminary to the establishment of the bargaining relationship be expeditiously resolved, with litigious questions reserved for the proceedings for review or enforcement of Board orders. The Board nonetheless makes it a practice to hold post-election hearings on objections to elections, but in keeping with the spirit of the Act does so only when it appears that the allegations relied on to overturn the election have a basis in law and that there is evidence to support them. The opportunity for protracted delay of certification of the results of representation elections which would exist in the absence of reasonable conditions to the allowance of a hearing on objections is apparent. An objecting party who fails to satisfy such conditions has no cause for complaint when and if his demand for a hearing is denied.

Id. at 78, 49 LRRM at 2220-21. (Footnotes omitted.)

The majority's result in this case could turn out to be that the Board is required to review each set of such unsupported objections by detailed hearing procedures. The already egregious delay between election and ultimate certification in NLRB election cases could be lengthened to a decade or more by this process.

I would grant enforcement.

No. 78-1492

FILED
JUN 1 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERNARD GUTTMAN t/a LIBERTY NURSING CENTER,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1492

BERNARD GUTTMAN t/a LIBERTY NURSING CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 19-20) is reported at 591 F. 2d 1335. The decision and order of the National Labor Relations Board (Pet. App. 21-34) are reported at 235 N.L.R.B. No. 179. The decision and certification of representative (Pet. App. 35-36) and the report and recommendations on objections to election (Pet. App. 37-44) in the related representation case are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19-20) was entered on January 15, 1979. A petition for

rehearing was denied by the court of appeals on April 30, 1979 (App., *infra*, 1a-2a). The petition for a writ of certiorari was filed on March 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly rejected petitioner's objections to a representation election without conducting an evidentiary hearing.

STATUTE AND REGULATION INVOLVED

1. The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 45-47.

2. 29 C.F.R. 102.69(d) (1978) provides in part:

> The action of the regional director in issuing a report on objections or challenged ballots, or both, * * * may be the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing * * *.

STATEMENT

1. Pursuant to a representation petition filed by Professional Health Care Division, Retail Clerks Local 1361, Retail Clerks International Association, AFL-CIO ("the Union"), the Board's Regional Director conducted an election among petitioner's employees on June 10, 1977. The Union prevailed in this election by a vote of 59 to 44 (Pet. App. 37). Petitioner filed timely objections to the election alleging, *inter alia*,

that two employee supporters of the Union engaged in improper conduct in the polling area; that the Union, through its representatives and employees acting on its behalf, threatened that employees would lose their jobs if they did not vote for the Union; and that the Union misrepresented petitioner's financial condition to the employees (Pet. App. 38).

a. In support of the objection concerning improper conduct in the polling area, petitioner submitted affidavits alleging that, after employees Mary Frey and Lewis Calcasacco voted, they stood in line and spoke with other employees waiting to vote. While the affidavits did not indicate the content of these conversations, the Regional Director's investigation revealed that Frey engaged in a social conversation with a friend waiting to vote, and that Calcasacco asked a fellow employee to vote for the Union. Neither petitioner's affidavits nor the Regional Director's investigation revealed any evidence to indicate that either Frey or Calcasacco had any authority to act on the Union's behalf (Pet. App. 39).

b. Regarding the alleged threats of job loss, petitioner submitted affidavits from employees stating: (1) that, in the course of campaigning, a union representative suggested to one affiant that petitioner could replace him with a younger man (Pet. App. 40); (2) that a union representative told another affiant that, if there were a strike, those who did not support the Union would lose their jobs; (3) that a third affiant received a telephone call from an unnamed person identifying himself only as a union representative and warning that she might lose her job if she did not vote for the Union—to which the affiant responded that she was not frightened because only her employer could fire her; (4) that, an hour after

receiving a call from Union representative Ray Stubblefield, an affiant received another call—this one anonymous—in which the caller stated that he would see to it that she would lose her job if she did not vote for the Union; and (5) that Stubblefield told a fifth affiant that those who voted against the Union would lose their jobs (Pet. App. 41).

c. Petitioner also presented evidence that, about a week before the election, the Union stated that petitioner could afford to pay higher wages because he owned profitable nursing homes in New Jersey and Florida. Upon learning about these statements, petitioner told his informant that he was losing money on the nursing home he owned in New Jersey and that he had closed the Florida home two years earlier (Pet. App. 43).

2. After conducting an investigation, the Regional Director found that, even assuming the truth of the statements contained in petitioner's affidavits, there was nothing to warrant invalidation of the election (Pet. App. 37-44).

a. The Director noted that, although last-minute electioneering by parties or their representatives at polling places is prohibited (*Michem, Inc.*, 170 N.L.R.B. 362 (1968)), there was no evidence in this case that either Frey or Calcasacco had authority to act on behalf of the Union (Pet. App. 39-40).

b. The Director stated that the alleged threats of job loss either "could not reasonably be construed to coerce employees in the exercise of their free choice in the election" or contained nothing suggesting the Union's responsibility (Pet. App. 42). With regard to the threats attributed to Union representative Stubblefield, the Director noted that "[n]either employee had reason to believe that the Union, in a

secret ballot election, could ascertain how she voted," nor have "reason to believe that the Employer favored the Union and on request was disposed to discharge any employee who voted *against* the Union" (*id.* at 42-43; emphasis in original). The Director also noted that the alleged Stubblefield threats "were made to only two employees in a unit of 109 employees and were not alleged to have been communicated to others in the voting group" (*id.* at 43).

c. Finally, the Director explained that, even if petitioner's allegations concerning Union misrepresentation of petitioner's business ventures were true, they were insubstantial because (*id.* at 44)

> the financial condition of the Employer's other facilities was not a matter with regard to which the employees would expect the Union to have authoritative knowledge of the true facts. In any event, the Employer had sufficient time to reply to the Union's statements. Thus, these statements are not material misrepresentations which would warrant setting aside the election either under the Board's recently overruled *Hollywood Ceramics* [140 N.L.R.B. 221 (1962)] rule or its [then] current *Shopping Kart* [228 N.L.R.B. 1311 (1977)] holding.

The Director therefore rejected petitioner's objections and recommended that the Union be certified as the employees' bargaining agent (Pet. App. 44).

3. The Board, after consideration of petitioner's objections, adopted the Director's findings and recommendations (Pet. App. 35-36). Petitioner thereafter refused to bargain with the Union, which the Board held to be in violation of Section 8(a)(5) and (1) of the Act. The Board entered a bargaining order (Pet. App. 21-34), which was enforced by the court of appeals (Pet. App. 19-20).

ARGUMENT

Petitioner contends (Pet. 9-17) that he was entitled to an evidentiary hearing on the objections to the representation election. Although the National Labor Relations Act does not provide for post-election hearings to resolve challenges or objections to an election, the Board has adopted regulations providing that an evidentiary hearing may be ordered when an administrative investigation reveals that "substantial and material factual issues exist." 29 C.F.R. 102.69(d) (1978). The sole issue raised in the petition (Pet. 9) is whether the Board properly concluded that a hearing was not required because petitioner's objections did not raise "substantial and material factual issues." The Board's resolution of this issue was based on its evaluation of the particular facts of this case. The analysis of the Board was upheld by the court of appeals and further review of this essentially factual issue is unwarranted.[1]

In any event, for the reasons discussed in the Director's Report (see pages 4-5, *supra*), there were no material issues of fact that required a hearing in this case. Even accepting the allegations in petitioner's affidavits as truthful, they were insufficient as a matter

[1]Petitioner urges (Pet. 10) that the Board regulation should be interpreted to require an evidentiary hearing where there is a "genuine issue as to any material fact," as under Rule 56 of the Federal Rules of Civil Procedure. We agree that this is a proper interpretation of the regulation (see cases cited Pet. 9). The issue here is simply whether petitioner's objections presented any genuine issues of material fact.

of law to invalidate the election.[2] There was, accordingly, no need for any further hearing on these claims.

[2]Petitioner contends (Pet. 12) that the fact that an employee urged support for the Union at the polling place "in and of itself" establishes a prima facie case that the employee was acting for the Union. The cases relied on by petitioner (Pet. 12-13) do not support this proposition. In *NLRB* v. *Georgetown Dress Corp.*, 537 F. 2d 1239, 1241, 1244 (4th Cir. 1976), mebers of the union's In-Plant-Organizing Committee engaged in electioneering in the polling area, and, in *Beaird-Poulan Division* v. *NLRB*, 571 F. 2d 432, 434 (8th Cir. 1978), five employees wearing "Union T-shirts" sat in the polling area after they voted (Poulan Br. App. 13-14, 64-72). Thus, in both cases, the evidence indicated that the employees had a significant association with the organizing unions. Similarly, in *Fidelity Telephone Co.* v. *NLRB*, 574 F. 2d 409, 410-411 (8th Cir. 1978), the employee involved had engaged in substantial activity on behalf of the union.

Petitioner asserts (Pet. 14-15) that the conclusion in this case that the alleged job-loss threats did not impermissibly restrain employee free choice is inconsistent with *Seamprufe, Inc.*, 82 N.L.R.B. 892 (1949), and *NLRB* v. *Southern Paper Box Co.*, 473 F. 2d 208 (8th Cir. 1973). Those cases differ markedly from the present case, however, for they both involved threats of retaliation made by union supporters and representatives if employees did not demonstrate support for the union *prior* to the election.

Petitioner is also mistaken in its contention (Pet. 15-16) that the Board's conclusion in this case that misrepresentations of petitioner's financial status were harmless conflicts with *NLRB* v. *Southern Paper Box Co.*, *supra*. In *Southern Paper Box*, the court found that the company had no time to respond to union allegations of financial misconduct, 473 F. 2d at 211; here, by contrast, the Board found the time for reply to be ample (Pet. App. 44). *Alson Mfg.* v. *NLRB*, 523 F. 2d 470 (9th Cir. 1975), on which petitioner relies (Pet. 15), is also inapposite. That case involved a complex set of false allegations of employer dishonesty and widespread threats of violence. Finally, as the court of appeals noted in denying the petition for rehearing (App., *infra*, 2a), "the insufficiency of petitioner's allegations distinguishes the present case from *Prestolite Wire Div.* v. *NLRB*, * * * 100 LRRM 2503 (6th Cir. 1979)."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board

MAY 1979

DOJ-1979-05

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1571

BERNARD GUTTMAN, t/a LIBERTY MUTUAL NURSING CENTER,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

RETAIL CLERKS LOCAL 1361, CHARTERED BY RETAIL CLERKS INTERNATIONAL UNION, AFL-CIO,

Intervenor

(Board No. 4-CA-8989, 235 NLRB No. 179)

PRESENT: SEITZ, *Chief Judge;* GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

ORDER DENYING PETITION FOR PANEL REHEARING

The Court, having read the petition for panel rehearing and the requested answer, concludes (1) that the Regional Director assumed in his report that each of petitioner's objections was true, but found each insufficient to warrant setting aside the election under either *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. No. 190, or *Hollywood Ceramics Co., Inc.*, 140

N.L.R.B. 221; (2) that the insufficiency of petitioner's allegations distinguishes the present case from *Prestolite Wire Div. v. NLRB*,—F. 2d—, 100 LRRM 2503 (6th Cir. 1979); and (3) that the Regional Director's failure to transmit the full record to the Board pursuant to 29 C.F.R. §102.69(g) does not merit denial of the Board's petition to enforce its order in this case. It is therefore

ORDERED that the petition for panel rehearing be and hereby is denied.

By the Court,

/s/ Seitz

SEITZ
Chief Judge

DATED: April 30, 1979

Supreme Court, U. S.
FILED
MAY 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1492

BERNARD GUTTMAN t/a
LIBERTY NURSING CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
and
PROFESSIONAL HEALTH CARE DIVISION,
RETAIL CLERKS LOCAL 1361,
CHARTERED BY RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondents.

BRIEF OF RESPONDENT LOCAL 1361 IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 78-1571

ROBERT F. O'BRIEN
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN
400 Market Street
Camden, New Jersey 08102
(609) 964-7768
Counsel for Retail Clerks Local 1361

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON
EASTERN PENNSYLVANIA REPRESENTATIVE
THE PLAZA, SUITE 237 PHILADELPHIA, PA. 19103
PHONE: (215) 568-7733

INDEX.

	Page
Question Presented	1
Statement of the Case	2
Argument	3
I. The decision below that Petitioner failed to raise substantial and material factual issues sufficient to warrant an evidentiary hearing does not raise any significant issues of importance to litigants other than those in the present case	3
II. The decisions below not to hold an evidentiary hearing were correct because the Regional Director found that even if the Petitioner's evidence and factual allegations were credited the election should not be set aside	8
III. No conflict between the Circuits is raised where the Courts have applied the same standards to different factual circumstances	13
Conclusion	14

TABLE OF CITATIONS.

Cases:

Alson Mfg. Aerospace Division of Alson Industries, Inc. v. N.L.R.B., 523 F.2d 470 (9th Cir. 1975)	12
Boire v. Greyhound Corp., 376 U.S. 473 (1964)	6
General Knit of California, 239 NLRB No. 101 (1978)	12
Hollywood Ceramics Co., 140 NLRB 221 (1962)	10,11,12
N.L.R.B. v. Air Control Products, 335 F.2d 245 (5th Cir. 1964)	6

Page

N.L.R.B. v. El-Ge Potato Chip Co., 427 F.2d 903 (3d Cir.1970) 6
N.L.R.B. v. Joclin Mfg. Co., 314 F.2d 627 (2d Cir.1963) 7
N.L.R.B. v. Southern Paper Box Co., 473 F.2d 208 (8th Cir.1973) 10,12
N.L.R.B. v. Sun Drug Co., 359 F.2d 408 (3d Cir.1966) 6,7,12
N.L.R.B. v. Tennessee Packers, Inc., 379 F.2d 172 (6th Cir.1967) 5,8
N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404 (1962) 4
Owens Corning Fiberglass Corp., 179 NLRB 219 (1969) 2
Prestolite Wire Div. v. N.L.R.B., ... F.2d ...., 100 LRRM 2503 (6th Cir.1979) 5,12
Seamprufe, Inc., 82 NLRB 892 (1949) 10
Shopping Kart Food Market, Inc., 228 NLRB No. 190 (1977) 11,12
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 3

Statutes:

29 C.F.R. § 102.62(b) 4,5
29 C.F.R. § 102.67 4
29 C.F.R. § 102.67(c) and (f) 4
29 C.F.R. § 102.69(d) 4
29 C.F.R. § 102.69(f) 4,5
29 C.F.R. § 102.69(g) 2

Rules:

F.R.C.P. Rule 40(3) 2
F.R.C.P. Rule 56 6

Miscellaneous:

H.R.Conf.Rep.No. 510, 80th Cong., 1st Sess., 56057 (1947), U.S. Code Congressional Service 1947, p.1135 6,7

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1492

BERNARD GUTTMAN t/a
LIBERTY NURSING CENTER,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

PROFESSIONAL HEALTH CARE DIVISION,
RETAIL CLERKS LOCAL 1361,
CHARTERED BY RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondents.

BRIEF OF RESPONDENT LOCAL 1361 IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 78-1571

Question Presented

Whether Employer who failed to make a convincing offer of proof sufficient to obtain an evidentiary hearing from the National Labor Relations Board or the United States Court of

Appeals for the Third Circuit should now obtain an evidentiary hearing by Order of the United States Supreme Court without adducing any new facts or allegations.

Statement of the Case

Pursuant to Rule 40(3) Respondent Local 1361 makes no separate statement of the case and would make the following corrections and additions to Petitioner's statement:

1. The Regional Director found that after voting, two employees held brief conversations with other employees waiting to vote. Petitioner states that the Regional Director "failed to address the question as to why neither employee was a 'representative' of the Union at the time the statements were made" (Pet.p.5). However, this issue was addressed by the Regional Director who found that ". . .the investigation disclosed no evidence that either of these employees had any authority to act on behalf of the Petitioner" (App.D, p.39). In addition, the Regional Director cited *Owens Corning Fiberglass Corp.*, 179 NLRB 219 (1969) in support of his finding that "Although it appears that one of these employees may have engaged in some activity in support of the Union's campaign, it is well established that the mere fact that employees are prominent in the Union's campaign is not sufficient to establish that they are agents of the Union" (App.D, pp.39-40; footnote omitted).

2. Petitioner recognizes that "The Courts of Appeals have held that in order to require a hearing in a post-election representation proceeding, the objecting party must supply evidence sufficient to make a *prima facie* showing as to facts which, if true, would require the holding of a new election" (Pet.p.9). In addition, 29 C.F.R. § 102.69(g) provides in pertinent part:

> . . .in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for a review of a regional director's decision on objections or challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director *and which were not included in the report or decision*. (Emphasis added).

Although Petitioner filed timely exceptions to the Regional Director's report together with a supporting brief, it did not file supporting affidavits or other documentary evidence with the Board (App.B, p. 24).

In its Brief in Support of its Petition to the Third Circuit for Review of the Decision and Order of the National Labor Relations Board (App.B) Petitioner supported its factual assertions by appending as "Exhibit A" one affidavit of its employee Kathryn Krause.

ARGUMENT

I. The decision below that Petitioner failed to raise substantial and material factual issues sufficient to warrant an evidentiary hearing does not raise any significant issues of importance to litigants other than those in the present case.

Petitioner claims that an evidentiary hearing should have been held regarding its objections to an election won by the Union.

The standard for review by this Court is well settled. As this Court said in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-1 (1951):

> Our power to review the correctness of application of the present standard ought seldom to be called into action.

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.* (Emphasis added)

The test applied by the Courts of Appeals as to whether on the record as a whole there is substantial evidence to support agency findings applies to all types of Board cases including representation cases. *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 407 (1962). The Regulations of the National Labor Relations Board commit the decision as to whether an evidentiary hearing is required in the first instance to the reasonable discretion of the Regional Director. Thus 29 C.F.R. 102.69(d) provides:

> The action of the regional director in issuing a report on objections or challenged ballots, or both, following proceedings under § 102.62(b) or § 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in paragraphs (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in § 102.67 to the extent consistent herewith.

Secondly, upon the filing of exceptions to the Regional Director's Report on the Election, the National Labor Relations Board decides whether the exceptions raise substantial and material issues sufficient to warrant a hearing.

Thus 29 C.F.R. 102.69(f) provides in pertinent part:

> In a case involving a consent election held pursuant to § 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.

Finally, review of the Board's decision can be had in the United States Courts of Appeals. The Courts of Appeals place the burden of proof on the party seeking a hearing. The very cases cited by Petitioner support this. Petitioner's Appendix G presents *Prestolite Wire Div. v. N.L.R.B.*, ... F.2d ...., 100 LRRM 2503 (6th Cir.1979) in which the Sixth Circuit reiterated its standard in *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 178 (1967) (App.G, pp.62-63):

> It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. . . Mere disagreement with the Regional Director's reasoning and conclusions do [sic] not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing. To request a hearing a party must, in its exceptions, define its disagreements and make an offer of proof to support

findings contrary to those of the Regional Director. The Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof. (Citations omitted.)

The Third Circuit similarly has stated:

> Judicial decisions have clearly established that the courts will review Board orders based on the disposition of challenges to crucial ballots without an evidentiary hearing to ensure that they are consistent with these rules. The parties are entitled to such a hearing if substantial and material factual issues are raised and if the Board has clearly erred in denying a hearing its order will not be enforced. It is equally clear, however, that such *a hearing will not be required if no such issues existed, either because the regional director and the Board have assumed the truth of the factual offer of the objecting party or because they have reasonably concluded that the facts alleged would not constitute legal justification for setting the election aside.*

N.L.R.B. v. Sun Drug Co., 359 F.2d 408, 414 (3d Cir.1966) (Citations omitted; emphasis added). *See also N.L.R.B. v. El-Ge Potato Chip Co.*, 427 F.2d 903, 906 (3d Cir.1970).

Petitioner urges the Court to apply the reasoning, philosophy and judicial precedent applicable to summary judgment criteria under F.R.C.P. Rule 56 to the administrative procedures of the Board (Pet.p.10). It is totally inappropriate to apply the precedents for summary judgment under F.R.C.P. Rule 56 to the administrative proceedings here. As the Third Circuit has said:

> A recognition of practical necessity underlies these rules. Time is a critical element in election cases. This factor explains the refusal of Congress to provide for judicial review of representation disputes until they result in an unfair labor practice order. See *Boire v. Greyhound Corporation*, 376 U.S. 473, 476-77, 479, 84 S.Ct. 894, 11 L.Ed.2d 849 (1964); *N.L.R.B. v. Air Control Products*, 335 F.2d 245, 251-52 (5th Cir.1964); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 56057 (1947), U.S. Code Congressional Service 1947, p. 1135. It is no doubt largely for the same reason that the statute does not require a hearing and that the Board's Rules and Regulations authorize an administrative investigation unless "substantial and material factual issues exist which can be resolved only after a hearing." Where there are no such issues, the decision of challenged ballots on the basis of an administrative investigation is "not only proper but necessary to prevent dilatory tactics by employers or unions disappointed in the election returns * * *." *N.L.R.B. v. Joclin Mfg. Co.*, 314 F.2d 627, 632 (2d Cir.1963).

N.L.R.B. v. Sun Drug, 359 F.2d at 414, footnote omitted.

Petitioner has had three opportunities to submit affidavits and other evidence to demonstrate the need for an evidentiary hearing. Petitioner has failed to convince the Regional Director, the National Labor Relations Board and the United States Court of Appeals for the Third Circuit that its objections raised substantial and material issues sufficient to warrant an evidentiary hearing. Petitioner has not now presented any new factual allegations nor made any other offer of proof showing that factual disputes exist which, if decided in Petitioner's favor, would change the outcome of the Board's decision.

The decision as to whether substantial and material factual issues exist is a decision well within the competence of administrative agencies and the Courts of Appeals. This is the type of judgment the Board and the Third Circuit are traditionally and constantly called upon to make. No guidance in logical thinking or explicit criteria need be handed down by the Court in order that this sort of decision be properly made as Petitioner alleges (Pet.p.10). It is impossible to propound decision criteria which will anticipate all future fact situations. Courts will always have to wrestle with the application of well settled legal principles to varying sets of facts.

II. The decisions below not to hold an evidentiary hearing were correct because the Regional Director found that even if the Petitioner's evidence and factual allegations were credited the election should not be set aside.

Petitioner seeks to have this case reviewed because he maintains an evidentiary hearing should have been held. As Petitioner states, "The Courts of Appeals have held that in order to require a hearing in a post-election representation proceeding, the objecting party must supply evidence sufficient to make a *prima facie* showing as to facts which, if true would require the holding of a new election" (Pet.p.9).

> The exceptions [to the Regional Director's Report] must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. . . . Mere disagreement with the Regional Director's reasoning and conclusions do [sic] not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing.

N.L.R.B. v. Tennessee Packers, Inc., 379 F.2d 172, 178 (6th Cir.) *cert. denied*, 380 U.S. 958 (1967) (App. G, p.62).

We submit that all Petitioner's objections are conclusions of law and that Petitioner has not offered evidence sufficient to make a *prima facie* showing as to facts which, if true, would require the holding of a new election. The Third Circuit has neither misapprehended nor misapplied the "substantial and material issues" test and therefore no review by the Court is warranted.

Petitioner repeats before this Court three of the four objections raised unsuccessfully below. In each instance the

Regional Director reasoned that even accepting the facts alleged and the evidence offered by Petitioner as true, the election should not be set aside.

First, Petitioner alleged below that two employees who were supporters of the Union engaged in conversation in the polling area with employees waiting to vote (Pet. pp.11-12). The Regional Director found that no evidence was presented as to the content of these conversations and no evidence was presented which demonstrated that these employees had any authority to act on behalf of the Union (App. D, p. 39). Thus even accepting that the conversations occurred, and that one of the conversations may have involved electioneering, the Regional Director found that these facts were not sufficient to set aside the election because the Petitioner did not produce evidence sufficient to show that either of the employees were agents of the Union (App. D, pp.39-40). No offer of proof was ever made by Petitioner which would show this. For these reasons there was substantial evidence to support the Board's findings and the Third Circuit was correct in affirming the Board's finding that Petitioner had not made a sufficient offer of proof to warrant granting an evidentiary hearing.

Second, Petitioner alleged that employees and representatives of the Union threatened five employees with loss of their jobs if they did not support the Union. The Regional Director did not contest the factual assertions, but found that even accepting them no facts were adduced sufficient to set aside the election. Thus, with regard to the first two employees the Regional Director found that the statements alleged to have been made to them ". . .could not reasonably be construed to coerce employees in the exercise of their free choice in the election" (App. D, p.42). There was no evidence to establish that the Union was responsible for the threatening telephone calls to the third employee and

Petitioner did not offer in its exceptions any additional evidence which, if credited, would establish this. With respect to the remaining two employees the Regional Director again found that "Even assuming. . .that the employees are to be credited, the statements made are not sufficient to warrant setting aside the election" (App.D, pp.42-43). For these reasons Petitioner failed to make a *prima facie* showing that substantial and material factual issues existed sufficient to warrant an evidentiary hearing.

Petitioner cites *Seamprufe, Inc.*, 82 NLRB 892 (1949) and *N.L.R.B. v. Southern Paper Box Co.*, 473 F.2d 208 (8th Cir. 1973) as instances in which either the Board or a Court of Appeals did order a hearing. These cases do not evidence any inconsistency with the present case. The Board or the Court of Appeals found that in *those* cases the petitioner had met the burden. In *this* case, applying the same test, and based on the offer of proof in Petitioner's exceptions and in its brief before the Court of Appeals, the National Labor Relations Board and the United States Court of Appeals for the Third Circuit decided that this Petitioner had failed to raise substantial and material issues of fact sufficient to warrant that an evidentiary hearing be held.

Third, Petitioner alleged that the Union made certain misrepresentations concerning its financial condition. Again, however, no resolution of contested facts was necessary because the Regional Director found that ". . .even if the Union had made the misrepresentations attributed to it by the Employer, the statements would not warrant setting aside the election" (App. D, p.44).

In support of its position Petitioner refers to the *Hollywood Ceramics* rule under which the Board would set aside an elec-

tion ". . .where there has been a misrepresentation or other similar campaign trickery, which involved a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation. . .may reasonably be expected to have a significant impact on the election." *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962) (Pet. p.15).

The alleged misrepresentations occurred about one week before the election in the present case which was held on June 10, 1977 (App. D, pp.37-43). Two months earlier the Board repudiated the *Hollywood Ceramics* rule and in *Shopping Kart Food Market, Inc.*, 228 NLRB No. 190 (1977), 94 LRRM 1705, decided on April 8, 1977, announced it was returning to its pre-*Hollywood Ceramics* rule. Under the *Shopping Kart* rule the Board stated that it would ". . .no longer set aside elections on the basis of misleading campaign statements [except]. . .where a party has engaged in such deceptive campaign practices as improperly involving the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is." 228 NLRB No. 190, 94 LRRM 1705, 1708 (1977).

The events in this case fall under the *Shopping Kart* rule and there is thus no possibility of setting aside the election even if the misrepresentations Petitioner has alleged are proved. There are no allegations in this case that the Union improperly involved the Board's processes or that forged documents were used. Thus an evidentiary hearing is totally unnecessary as to this objection and would not enable

Petitioner to prove facts which, if established, would be grounds for setting aside the election.[1]

Petitioner cites three cases in which Courts of Appeals found that allegations of misrepresentations presented therein raised substantial and material factual issues sufficient to warrant an evidentiary hearing: *N.L.R.B. v. Southern Paper Box Co.*, 473 F.2d 208 (8th Cir.1973); *Alson Mfg. Aerospace Division of Alson Industries, Inc. v. N.L.R.B.*, 523 F.2d 470 (9th Cir.1975); *Prestolite Wire Div. v. N.L.R.B.*, ... F.2d ...., 100 LRRM 2503 (6th Cir.1979) reprinted in Appendix G, pp.54-70). The *Southern Paper Box* election was held on April 9, 1971, 473 F.2d at 209; the *Alson* election was held on June 28, 1973, 523 F.2d at 471; the *Prestolite* election was held on July 3, 1975, App. G, p.55. All three elections came under the *Hollywood Ceramics* rule. These cases are therefore all inapposite because while misrepresentations are a basis for setting aside an election under *Hollywood Ceramics*, the misrepresentations alleged by Petitioner here are *not* a basis for setting aside an election under *Shopping Kart* which was the applicable rule in this case.

For all these reasons, there was substantial evidence considering the record as a whole to support the findings of the Board and the Third Circuit correctly decided that Petitioner

[1] On December 6, 1978, the Board announced it was returning to the *Hollywood Ceramics* rule in *General Knit of California*, 239 NLRB No. 101, 99 LRRM 1687. Of course, a change in the rule after the events in question in this case is not controlling. Moreover, the Regional Director found that even if the Union had made the misrepresentations attributed to it by the Employer, the statements were not material misrepresentations which would warrant setting aside the election under the *Shopping Kart* rule or under the *Hollywood Ceramics* rule (App. D, p.44). Thus it is clear that, at least as to this objection "the Board. . . assumed the truth of the factual offer of the objecting party [and has] . . . reasonably concluded that the facts alleged would not constitute legal justification for setting the election aside." *N.L.R.B. v. Sun Drug Co.*, 359 F.2d 408, 414 (3d Cir.1966).

had failed to make a sufficient offer of proof to warrant ordering an evidentiary hearing.

III. No conflict between the Circuits is raised where the Courts have applied the same standards to different factual circumstances.

Petitioner does not allege that the standard followed by the Third Circuit conflicts with that followed by the other Circuits. Rather Petitioner's claim appears to be that the Courts of Appeals arrive at different decisions under apparently similar factual circumstances.

It has been argued above that the cases cited by Petitioner while superficially similar, are all different in important crucial respects. It has also been argued above that the type of decision involved here, namely, whether Petitioner raised substantial and material factual issues which, if credited, would result in setting aside the election, are the type of judgment the Board and the Courts of Appeals are constantly called upon to make and are well within the competence of these bodies. It is impossible to arrive at a set of decision criteria which would instruct the Board and the Courts how to decide all possible cases. Finally, this Court has stated it will only review decisions in the Courts of Appeals in those rare instances when the standard appears to have been misapprehended or grossly misapplied. It has been argued above that the Third Circuit and the Board have correctly applied the applicable standards and that there is therefore no occasion for this Court to intervene.

Conclusion

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way which conflicts with the decisions of other Courts of Appeals or of this Court on the same matter. The Court of Appeals correctly applied the applicable standard of review and the findings of the Regional Director and the National Labor Relations Board are supported by substantial evidence considering the record on the whole.

Respectfully submitted,

ROBERT F. O'BRIEN,
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN,
Attorneys for Respondent,
Retail Clerks Local 1361,
400 Market Street,
Camden, New Jersey 08102.